88-1652

Supreme Court, U.S.
FILED
APR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

ROGER EMERICK,
Petitioner,

v.

WALTER BORDEN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

Pro Se Petitioner:

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580 Hopewell Road
S. Glastonbury, CT 06073
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QUESTION PRESENTED

Did it violate plaintiff's right to due process to have his case termintated after the pleadings were closed for an alleged pleading defect, raised sua sponte by the court, where plaintiff was not given notice that the court was considering this defect, was not given an opportunity to oppose such allegation by written memorandum, and was not given an opportunity to amend his complaint to correct this pleading defect?

PARTIES TO THE CASE

Petitioner/Plaintiff:

Roger C. Emerick, 580 Hopewell Rd., S. Glastonbury, Ct. 06073

Respondent/Defendants:

Dr. Walter A. Borden and his wife Edene Borden, 37 Candlewood Dr., W. Hartford, Ct. 06117

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OPINION BELOW

The CT. Superior Court did not issue an opinion. Its judgment is printed in the appendix hereto at p. 1A. The opinion of the Connecticut Appellate Court is reported as Emerick v. Borden et al, 17 Conn. App. 802, cert denied by the Ct. Supreme Court on 1-12-89, and is reprinted in the appendix hereto, pp. 10A and 11A.

JURISDICTION

This petition is from the final judgment of the Ct. Appellate Court on October 26, 1988 affirming judgment by the Ct. Superior Court on April 29, 1987. A petition for certification to the Ct. Supreme Court was timely filed December 28, 1988 and denied on January 12, 1989. The jurisdiction of this Court to review the judgment of the Ct. Appellate Court is invoked under 28 U.S.C. $1257.

CONSTITUTIONAL PROVISIONS INVOLVED

14th Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The plaintiff brought suit on Feb. 12, 1985 against the defendants, a physician and his wife, citing neglegent conduct in the performance of professional services and damages resulting therefrom. The

defendant, Dr. Walter Borden, is a well known forensic physician in the state.

The defendants moved to strike the complaint on the basis that this must be considered a malpractice claim and there was no allegation of a physician-patient relationship. The plaintiff filed an amended complaint citing he sincerely believed a physician-patient relationship existed. The defendants were satisfied and filed an answer.

After the pleadings were closed and the case positioned for trial the defendants moved for summary judgment. The court noted that the defendants did not prove their case for summary judgment. Then, on its own initiative, the court claimed that there was no "allegation" of a physician-patient relationship, only a statement by the pro se plaintiff that he "sincerely believed"

there was one. The court maintained that such an allegation is necessary to maintain an action for medical malpractice and noted that while this defect is generally pointed out by a motion to strike, it need not be. The court then granted the summary judgment solely on the basis of the alleged defect, thus terminating the case.

The plaintiff filed motions to reargue and also to replead to correct the defect. Both were denied by the court, noting that a summary judgment terminated the case.

Although plaintiff claimed a conflict of interest, the appeal went to the Appellate Court where defendant Walter Borden's brother, Judge David Borden, sits as an appellate judge! The decision was affirmed without comment. A petition for certiorari to the Ct. Supreme Court was denied.

REASONS FOR GRANTING THE WRIT

Plaintiff's case was terminated by the granting of a summary judgment solely on the grounds of an alleged pleading defect raised sua sponte by the court in private review of the motion. Plaintiff did not know any defect was being considered, did not have an opportunity to respond to it, and was not permitted an opportunity to correct the defect by amending his complaint. Essentially this amounted to a sua sponte motion by the court to dismiss a complaint for a pleading defect and using a summary judgment as a vehicle for that dismissal.

This writ should be granted to ensure that plaintiff, a non-lawyer pro se litigant, is accorded basic standards of procedural due process clearly spelled out by Connecticut Statutes, Rules of Practice and case precedent and as

supported by analogous rulings in the federal appellate courts.

In Connecticut both the General Statutes and the Practice Book establish rules for pleading designed so that litigants will not be deprived of due process.

Ct. Practice Book Sections 379 and 384 provide that a summary judgment is used where, after the pleadings are closed, and there are no issues of material fact, a judgment may enter as a matter of law. In this case however the summary judgment was used, solely on the courts own initiative, to point out a defect in the pleadings which it conceded is normally pointed out by a motion to strike. The court cited Boucher Agency, Inc. V. Zimmer, 160 Conn. 404, 409 (1971) as its' authority for using a summary judgment to point out a pleading defect. Boucher was

not analogous to the present case. It permitted a deviation in the usage of pleadings, where there was no prejudicial error, in terminating a case where there were no underlying facts that could have resulted in a viable cause of action, regardless of how pleaded. Contrary to Boucher, there was prejudicial error in Emerick where plaintiff could easily have amended his complaint to correct a defect claimed sua sponte by the court.

Ct. Practice Book Sec. 155 permits a case to be stricken for a defect in the pleading upon motion by the opposing party and after allowing memorandums from both sides. If a case is stricken for a defect, Section 157 permits 15 days to file a new pleading which corrects the defect. This is in accord with Ct. General Statute 52-130 which states: "Parties may amend any defect, mistake or

informality in the pleadings or other parts of the record or proceedings. When either party supposes that in any part of the pleadings he has missed the ground of his plea, and that he can plead a different plea that will save him in his cause, he may change his plea, answer, replication or rejoinder, as the case may be, and plead anew and the other party shall have a reasonable time to answer the same;" The plaintiff in Emerick was not permitted the opportunity to correct an alleged defect and replead because the defect was not pointed out on a motion to strike by the opposing party but sua sponte by the court during review of a summary judgment, the granting of which terminates the case.

Terminating the case by granting the summary judgment solely on the basis of a pleading defect was contrary to Ct.

General Statute 52-123 which provides that "... no pleading shall shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and cause may be rightly understood and intended by the court" (emphasis added). This was upheld in Guilietti v. Connecticut Ins. Placement Facility, 205 Ct. 424 (1987) which held that where both parties know what the theory of recovery is and there will be no surprise to either one at trial, a technical deficiency should not nullify a cause of action. "Slight linquistic ambiguity does not serve to nullify a cause of action which is sufficiently raised to notify the defendant of its existance."

Ct. Practice Book Section 6 states that the rules of practice shall be liberally interpreted where it shall be

manifest that a strict adherance to them shall work surprise or injustice. There can be no doubt that plaintiff, upon reading the court's memorandum of decision, was certainly surpised and felt injustice when the court pointed out, sua sponte, a pleading defect discovered during private review of a summary judgment, and which plaintiff was then not permitted to correct.

According to the aforenoted Statute, Practice Book and case law of Connecticut, a plaintiff should be permitted the opportunity to correct a defect in his complaint. It does not make sense to allow the use of a Summary Judgment to point out technical defects in a pleading without permitting an opportunity to correct those defects because it prevents the plaintiff from having his day in court. Why use a

motion to strike, which permitts a replead, if you can use a summary judgment for the same end and prevent a repleading because there is no second chance with a summary judgment? The injustice is magnified where it is the court who, sua sponte and during private review of the summary judgment, claims a pleading defect thus denying the plaintiff even the knowledge that the defect is being raised, or an opportunity to respond to it until it is too late. The trial court's refusal to allow plaintiff to replead violates plaintiffs' civil right to due process. The rulings by federal appellate courts in analogous situations have consistantly found error.

The court's duty on motion for summary judgment is limited to determining whether factual issues exist, not in determining the issues themselves. Gauck

v. Meleski. Appellate courts have frequently cautioned against the use of a summary judgment procedure in cases for which that procedure was not designed. Freeman v. Continental Gin Company. A motion for summary judgment amounts to a representation by the litigants that the case is fully at issue, that all theories of liability and all defenses have been presented, and that the case is ripe for summary treatment. Pharo v. Smith. (Note in Emerick the pleadings had been closed and it was during a motion for summary judgment where the court, sua sponte, claimed to have found a pleading defect. This identical defect had already been raised by defendant on a motion to strike and resolved to defendants satisfaction!) It is prudent for judges to avoid an inquisitorial role, and not search out issues more

appropriately left to a motion by the opposing party. Lewis v. State of N.Y. @5. In rulings on motions to dismiss a pro se complaint shall be held to less stringent standards than formal pleadings drafted by a lawyer. Frankos v. LaVallee @1347. (Note in Emerick the court found that a statement by plaintiff that he "believed that a physician-patient relationship existed" did not constitute an allegation of the existance of this relationship.) While Federal Rules of Civil Procedure do not provide for sua sponte dismissal by the court, dismissals have been sanctioned in the face of a clear record of delay or contumacious, frivolous or vexatious conduct by the plaintiff. Jefferson Fourteenth Assoc. V. Wometco de Purerto Rico @526; Freeman v. Continental Gin Company. (Note that none were cited in Emerick); The

inherent power to dismiss a case that lacks merit may only be done when the party has been given notice and an opportunity to respond and, pursuant to Fed. R. Civ. P. 15, to amend his complaint to overcome any deficiencies. Jefferson Fourteenth Assoc. V. Wometco de Purerto Rico @527.

In California Diversified Promotions, Inc. v. Musick, the court on its own initiative dismissed the case. The 9th Circuit Court held that the trial court should have given notice of its intention to dismiss, and should have provided an opportunity for plaintiffs to submit a written memorandum in opposition to such motion, a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court. (emphasis added). This identically parallels the Emerick case and supports

the claims made here by plaintiff that he should have at least been permitted to amend his complaint to correct a pleading defect raised by the court. The due process requirements identified in Musick have been consistantly upheld in other federal appellate rulings. See Jefferson Fourteenth Assc. v. Wometco de Puerto Rico; Lewis v. State of N.Y..

It is unfortunate but argueably true, that this case reflects not complex issues of law, but the human realities of political courtesy in the buisiness of law. In a nutshell, it becomes obvious the trial court was not going to permit a non-lawyer pro se plaintiff to bring a well known forensic physician, whose brother also happens to be an appellate judge, to a jury trial. And the appellate court was certainly not going to subject the brother of it's colleague,

to a highly publicized trial by this non-lawyer pro se. I think it not unreasonable or improper to raise the spectre that this was a deliberatly bad decision at both the superior and appellate court levels. To maintain that the judiciary by definition consists of men of integrity and impartiality is a falacious and overly idealistic argument. The trial judge in this case, on presentation for judicial reappointment, was subjected to state legislative examination on issues of alcoholism and veracity. He subsequently withdrew from reappointment to the judiciary.

If the judges of the U.S. Supreme Court cannot readily explain to themselves how there was no error, and cannot draw upon a similar experiance, then it should accord the case review and

reversal in order that plaintiff, a pro se litigant, may amend his complaint to correct a pleading defect and proceed to trial with a perfectly good civil case.

CONCLUSION

A plaintiff has the civil right to be given notice of any claimed defect in his pleading, an opportunity to respond to it, and an opportunity to correct the defect prior to the dismissal or termination of his case. In EMERICK V. BORDEN this was not done, and the failure to do so violated plaintiff's civil right to due process.

Respectfully Submitted

Pro Se Petitioner

Roger Emerick

Roger Emerick

580 Hopewell Rd.

S. Glastonbury, Ct. 06073

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JUDGMENT OF SUPERIOR COURT

NO. 307621

ROGER C. EMERICK	:SUPERIOR COURT
VS.	:JUDICIAL DISTRICT
WALTER BORDEN	HARTFORD-NEW BRITAIN
ET AL	AT HARTFORD
	:APRIL 29, 1987

MEMORNADUM OF DECISION

ON

MOTION FOR SUMMARY JUDGMENT

The plaintiff in this action alleges

psychiatric malpractice by the defendants, Walter and Edene Borden, in the performance of a psychiatric examination as part of a custody judgment in a dissolution of marriage action. The defendant, Walter Borden, who is licensed to practice medicine and specializes in psychiatry, was assisted by his wife, Edene Borden, in the psychiatric evaluation of plaintiff, the plaintiff's then wife and the plaintiff's child, which took place from May to July 1982. The defendant, Edene Borden, holds a masters degree in counseling.

The defendants have now moved for summary judgment, asserting that there was no physician-patient relationship between them and plaintiff. In support of the motion they offer a memorandum of law, their affidavits and other documentary proof. The plaintiff offers

his memorandum of law and affidavit, as well as the affidavits of Robert Colucci of the Family Relations Division of the Superior Court and of Gene Gordon, a licensed psychiatrist. The pleadings are closed, thus properly positioning the motion before the court.

Summary judgment may be granted "if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Conn. Pratice Bk. $ 384. To succeed in an action for malpractice, the defendants assert that the plaintiff must establish the existence of a patient-physician relationship. See Buttersworth v. Swint, 186 S.E. 770, 772 (Ga. App. 1936); Brown v. Riel, 40 S.W. 2d 621, 622 (Mo. 1931); see also Landon v. Humphrey, 9 Conn. 209,

216 (1832); and Force v. Gregory, 63 Conn. 167, 172 (1893). If the defendants can prove that no such relationship exists, they must succeed in their motion, say they. See Dean v. Hershowitz, 119 Conn. 398, 405-406, 408-409 (1935) and Sheridan v. Quanrier, 127 Conn. 279 (1940).

The pleadings do not settle the question of whether this relationship came into existence. The plaintiff's amended complaint does not allege the existence of such a relationship. It alleges the plaintiff "actually and sincerely believed a physician-patient relationship existed." The defendants neither admit nor deny this allegation, and instead leave plaintiff to his proof. The affidavits of Dr. Borden and Mrs. Borden state that plaintiff and his family were interviewed pursuant to a

court order, but they were never requested to, nor did they, treat the plaintiff or any member of plaintiff's family as a patient. The defendants' other proof, copies of a transcript and of billing statements, do not really address the issue of treatment.

The plaintiff's affidavit states that he paid for an evaluation by defendants and otherwise states that he believed that there was a physician-patient relationship between himself and defendants. See Kolibczynski v. Aetna Life & Casualty Co., 176 Conn. 676, 678-679 (1979) and the cases cited therein. Robert Colucci, Supervisor of the Family Relations Division for the Superior Court at Hartford, states in his affidavit that his office did not request a psychiatric exam in the plaintiff's case. Dr. Gordon's affidavit

states that an evaluation, like the one performed by defendants, creates a physician-patient relationship for the purposes of actions $52-146 (6) (7) of the Connecticut General Statutes. However, as to the Gordon affidavit, the definitions in those sections apply inclusively to Sections 52-146c through 52-146i relating to privilaged communications. Not only does the Gordon affidavit consist of legal conclusions, but the topic of privilaged communications bears no relationship to the present issue or the allegations of the complaint.[1] See Kolibczynski v. Aetna Life & Casualty Co., supra, and Farrell v. Farrell, 172 conn. 39 (1980).

The evidence offered in support of and in opposition to the motion does not establish whether a physician-patient relationship existed.

Nonetheless, none is alleged. Such an allegation is necessary in this state to maintain an action for medical malpractice. And while such a requirement is generally pointed out by a motion to strike; Section 151, et seq., Connecticut Practice Book; it need not; Boucher Agency, Inc. v. Zimmer, 160 Conn. 404, 409 (1971).

The palitiff is represented by himself. Consistent with our case law; Bitonti v. Tucker, 162 Conn. 626 (1972); the complaint has been examined to determine whether it states any other cause of action recognized in this state.

Research indicates that the closest situation to the present one exists where a physician is sued for disclosing information about a patient. A cause of action has been recognized in other jurisidictions where an evidentiary

privilege is recognized by the state; Clark v. Geraci, 208 N.Y.S. 2d 564 (N.Y. Sup. Ct. 1960); or where improper disclosure of such information is deemed unprofessional conduct. Id.; see Simonsen v. Swenson, 177 N.W. 831 (neb. 1920) (court apparently would have permitted the action if other factors did not exist). But see Quarles v. Sutherland, 389 S.W.2d 249 (Tenn. 1965) (although deemed to be unprofessional conduct, the only remedy is revocation of license). In this state a physician's license may be revoked for "illegal , incompetent or negligent conduct in the practice of medicine ..." Conn. Gen. Stat. $20-13c(4). By adding to the plaintiff's allegations and inferring incompetent or negligent conduct, this court probably could, on bases analogous to the Clark and Simonsen cases, create a

cause of action without requiring a doctor/patient relationship. However, the reasoning in Quarles is sound and this court would hold that any ethical violations by Dr. Borden should be viewed as remedied only by a license revocation procedure.

The court can only go so far to assist a party who appears pro se; the legitimate rights of opposing parties must also be protected. Cersosimo v. Cersosimo, 188 Conn. 385, 393 (1982).

The motion for summary judgment is granted.

Judge Richard Noren

FOOTNOTE

1. Section 52-146c, for instance, creates a limited privilege for conversation for any "individual who, for the purpose of securing psychological services, consults a licensed psychologist" even if no patient status is created. Section 52-146d(6) defines "patient" to include one "who communicates with or is treated by a psychiatrist in diagnosis or treatment" but the definition only applies to Section 52-146c to

52-146i. See Shuster v. Buckley, 5 Conn. App. 473, 477 (1985).

Opinion of the Ct. Appellate Court

17 Conn. App. 802 (Jan. 12, 1989)

ROGER C. EMERICK V. WALTER A BORDEN ET AL

(6295)

SPALLONE, NORCOTT, FOTI, Js.

Argued October 5 -- decision released October 26, 1988.

PER CURIAM. There is no error.

Order of the Ct. Supreme Court

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-88-1117

Roger Emerick

v.

Walter A. Borden et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the plaintiff for certification to appeal from the Appellate Court (17 Conn. App. 802) it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

Cynthia M. Gworek

Assistant Clerk- Appellate

Dated: January 12, 1989

Notice to: 1/12/89 Clerk, Superior Court, Hartford, 307621

Clerk, Appellate Court

Roger C. Emerick, pro se

Weinstein, Seltzer, Denezzo, Swirsky & Kulick

Roger Emerick, pro se in support of petition---Gerald R. Swirsky in opposition.

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v.

WALTER BORDEN, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Walter Borden, et al.:

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STATEMENT OF CASE

Petitioner originally brought this action against the respondents alleging that the respondents failed to exercise proper skill and care in performing an evaluation to be used in a court-ordered custody study involving the petitioner, his then spouse, and their minor child. The respondents filed a Motion to Strike the Complaint on the grounds that the Complaint failed to allege facts supporting the existence of a physician-patient relationship. The petitioner ultimately filed an Amended Complaint wherein he alleged that he "believed that a physician-patient relationship existed." Respondents, in their Answer to Amended Complaint, neither admitted nor denied the allegation referring to the petitioner's "belief" that said relationship existed.

The respondents, thereafter, filed a Motion for Summary Judgment with supporting affidavits and other documentary evidence.

Although the lower court attempted to extend to the petitioner the greatest latitude in its examination of the Amended Complaint, the court held that the absence of facts supporting the existence of a physician-patient relationship was crucial and granted respondents' Motion for Summary Judgment which was sustained by the Connecticut Appellate Court and the Connecticut Supreme Court.

ARGUMENT

I. THERE WAS NO SUBSTANTIAL FEDERAL QUESTION RAISED IN STATE COURT.

The Supreme Court's jurisdiction to review a state court decision under 28 U.S.C.S. Section 1257, whether by appeal or certiorari, is dependent upon the presence of a federal question in the case. The petitioner has failed to specify at what stage in the proceedings below a federal question was raised, how it was raised, and how passed on by the lower court. *Webb v. Webb,* (1981 U.S.) 68 L. Ed. 2d 392, 101 S. Ct. 1889.

The Petition contains the Memorandum of Decision on Motion for Summary Judgment granting defendant-respondents' Motion based on the failure to allege facts supporting a physician-patient relationship. Said decision properly sets forth the lower court's reasoning and application of existing state law and procedure. The petitioner has made no showing that said judgment rendered in the court below could not have been given without deciding a federal question which would, thus, give the United States Supreme Court jurisdiction under 28 U.S.C.S. Section 1257. *Yazoo and M.R. Company v. Adams,* 180 U.S. 41, 45 L. Ed. 415, 21 S. Ct. 256.

It is well accepted that this Court will not review a decision of a state court resting upon adequate and independent nonfederal grounds. The respondents submit that the judgment entered by the state court in this case was based on adequate law and procedure. *Boucher Agency, Inc. v. Zimmer,* 160 Conn. 404, 409 (1971); *Wilson v. Loew's Inc.,* 355 U.S. 597 (1957); Section 384, Connecticut Practice Book.

Further, the Memorandum of Decision of the Trial Court, included in the Petition, evidences the fact that the lower court gave the petitioner-plaintiff every latitude in examining the Complaint. (See pg. 7A of Appendix to Petition for Writ of Certiorari.)

II. THE GRANTING OR DENIAL OF PETITIONER'S MOTION TO AMEND AND FILE SUBSTITUTE COMPLAINT WAS WITHIN THE DISCRETION OF THE TRIAL COURT AND WAS PROPERLY REVIEWED UNDER STATE LAW.

The petitioner cites a number of Federal Appeals Court cases which deal primarily with premature dismissals of complaints by inmates, or application to a lower court seeking to enjoin enforcement of state criminal statutes.

The *Emerick* case is a civil action. The Appellate Court appropriately reviewed the chronology of the pleadings in the case in considering whether the lower court abused its discretion and found no error under existing law and procedure.

There was adequate and independent nonfederal grounds upon which the Connecticut Appellate Court could and did find no error. *Benson v. Morey*, 129 Conn. 390 (1942); *Shuster v. Buckley*, 5 Conn. App. 473, 479 (1985); *Conference Center Ltd. v. TRC*, 189 Conn. 212 (1983); *Beckman v. Talich Homes*, 190 Conn. 299 (1983).

In the case below, the pleadings were closed as of June 17, 1986. Plaintiff moved to amend and file substitute complaint on June 11, 1987, or almost one year after the pleadings were closed and after the trial court granted defendant-respondents' Motion for Summary Judgment. Respondents acknowledge that it has been the court's established policy to allow great latitude to a litigant who, either by choice or necessity, represents himself in legal proceeings, so far as such latitude is consistent with the just rights of any adverse party. Such a litigant is bound by the same rules of evidence and procedure as those qualified to practice law. Respondents further submit that there was, in fact, no deprivation of petitioner's rights under state law. *Cersosimo v. Cersosimo*, 188 Conn. 385, 393 (1982); *Hartford National Bank & Trust Co. v. Defazio*, 177 Conn. 34, 39n (1979).

CONCLUSION

Since the decision in this case was based on adequate and independent nonfederal grounds, and every latitude was given to the petitioner, and there has been no showing that a substantial federal question was raised and passed on by the Connecticut court, the Petition should be denied.

Respectfully Submitted,

Respondents, Walter Borden, et al.

By GERALD R. SWIRSKY of
WEINSTEIN, SWIRSKY, KULICK,
NEEDELMAN, CONNOLLY &
WILLIAMS

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BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

The facts of this case are as articulated in petitioner's Petition for Writ of Certiorari. In addition to the facts presented there, petitioner presents the following facts which are in direct contradiction to those stated in the respondent's Statement of the Case. They are presented here in so far as they are to be considered relevant in consideration of this petition. They are:

1. The respondents claimed that they filed a Motion to Strike the Complaint on the

ground that the complaint failed to allege facts supporting the existence of a physician-patient relationship.

This is not so. The respondants filed a Motion to Strike solely for the following reason: "The complaint fails to state a cause of action of malpractice in that there is no allegation of any physician-patient relationship as between the plaintiff and defendants which would give rise to a legal duty owed to the plaintiff by the defendants."

2. The respondants claimed that the lower court held that the absence of facts supporting the existance of a physician-patient relationship was crucial and granted respondents' Motion for Summary Judgment.

This implies an incorrect basis for the granting of the Summary Judgment. As can be seen from the judgment included in petitioner's application for writ, the

Summary Judgement was granted solely on the grounds that the court claimed that plaintiff had not alleged a physician-patient relationship.

ARGUMENT

I. THERE IS A SUBSTANTIAL FEDERAL QUESTION RAISED IN THE STATE COURT.

Petitioner has brought his peitition on the claim that the granting of a summary judgment by the state court solely on the grounds of an alleged pleading defect, discovered by the court during private review of the motion, was in error where plaintiff was not given an opportunity to correct the defect.

Respondents argue there is no substantial federal question raised in the state court. Petitioner claims the contrary. The Rules of

Practice and General Statutes cited in his petition are the same as those used in his appeal to the State Appellate Court. They outline the rules of civil procedure in the state court, which are the cornerstone of ensuring that the basic elements of due process are met. Petitioners' appellate arguements were that the many cited rules of practice and procedure, as prescibed by the Ct. Practice Book and the Ct. General Statutes, were being violated by the lower courts ruling. Had any of them been followed, plaintiffs' case would not have been dismissed. Compliance with these rules is synonomous with securing petitioners' right to due process under the United States Constitution.

II. WHETHER OR NOT THE GRANTING OR DENIAL OF PETITIONER'S MOTION TO AMEND AND FILE A SUBSTITUTE COMPLAINT WAS WITHIN THE DISCRETION OF THE TRIAL COURT IS IRRELEVANT TO THIS PETITION.

The respondents argue:

"The Emerick case is a civil action. The Appellate Court appropriately reviewed the chronology of the pleadings in the case in considering whether the lower court abused its discretion and found no error under existing law and procedure. There was adequate and independent nonfederal grounds upon which the Connecticut Appellate Court could and did find no error."

There is no arugment by petitioner as to whether the lower court had the right to grant or deny his motion to amend; But rather whether the lower court was correct in the ruling it gave during the exercise of that right.

The Appellate Court decision was a simple "No Error" without discussion. It is innappropriate for the respondants to argue that the Appellate Court appropriatly reviewed the chronology of the pleadings and found no error based on nonfederal grounds. It is unknown what, if any, criteria the Appellate Court relied on in reaching its' decision.

CONCLUSION

Adherance to the rules of civil practice and procedure as articulated by the Ct. Practice Book and the Ct. General Statutes, is synonomous with securing a litigants civil right to due process.

As claimed, the granting of a summary judgment solely on the grounds of pleading defect discovered by the court during a private review of the motion, and without permitting an amendment to correct said defect, is a violation of due process under the U.S. Constitution.

Respectfully Submitted

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